

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LOUISE ARMIJO,

Plaintiff,

v.

YAKIMA HMA, LLC,

Defendant.

NO: 11-CV-03114-TOR

ORDER RE: MOTION TO DISMISS
AND MOTION TO AMEND

BEFORE THE COURT is Defendant Yakima HMA, LLC's Motion to Dismiss certain claims (ECF No. 7). Also before the Court is Plaintiff's Alternative Motion for Leave to Amend her complaint (ECF No. 16). The Court heard oral argument by telephonic hearing on March 22, 2012. Victor Ro appeared on behalf of the Plaintiff, Louise Armijo. Paula L. Lehmann and Maria Abramova appeared on behalf of Defendant Yakima HMA, LLC. The Court has reviewed the motions, the responses, the record and files herein and is fully informed.

The Parties are reminded to follow the Local Rules for the Eastern District of Washington, including, but not limited to Rule 10.1(a)(2) requiring double

1 spaced footnotes and all typed matter in at least 14 point typeface or monospaced
2 typeface of no more than 10.5 characters per inch. In the future, offending
3 pleadings will be stricken.

4 At the outset of the hearing, the Court questioned Plaintiff whether it would
5 be appropriate to dismiss all the individual defendants who had not been served
6 within 120 days as required by Fed.R.Civ.P. 4(m). Counsel for Plaintiff indicated
7 no objection to the dismissal of individual defendants who had not been served.
8 Accordingly, those individuals will be dismissed and the caption of this case
9 amended to reflect this Order.

10 BACKGROUND

11 On June 28, 2010, Ms. Armijo was discharged from her job as a financial
12 counselor for Yakima HMA, LLC, doing business as Toppenish Community
13 Hospital. This suit, seeking damages and other relief, was filed November 17,
14 2011. Plaintiff filed a First Amended Complaint on January 5, 2012, a 75-page
15 document seeking relief for her termination and for the alleged acts leading up to
16 and culminating in her termination, under various legal theories.

17 Defendant moved to dismiss the following 10 claims out of the 15 claims in
18 the Complaint:

- 19 (i) wrongful discharge in violation of public policy;
20 (ii) failure to accommodate;

- (iii) intentional infliction of emotional distress (outrage);
- (iv) negligent infliction of emotional distress;
- (v) negligent hiring, training, managing and supervision;
- (vi) negligent retention;
- (vii) defamation, libel and slander;
- (viii) invasion of privacy by false light;
- (ix) failure to pay overtime; and
- (x) breach of contract.

DISCUSSION

To withstand a motion to dismiss pursuant to Rule 12(b)(6), a complaint must set forth factual allegations sufficient “to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.* (“Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation” (internal quotation marks omitted)). A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not

1 do.” *Id.* Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a
2 “short and plain statement of the claim showing that the pleader is entitled to
3 relief.” The pleading standard set by Rule 8 of the Federal Rules of Civil
4 Procedure “does not require ‘detailed factual allegations,’ but it demands more
5 than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v.*
6 *Iqbal*, 556 U.S. 662, ---, 129 S.Ct. 1937, 1949 (2009). Rule 8 marks a notable and
7 generous departure from the hyper-technical, code-pleading regime of a prior era,
8 but it does not unlock the doors of discovery for a plaintiff armed with nothing
9 more than conclusions. *Id.* at 1950. In assessing whether Rule 8(a)(2) is satisfied,
10 the Court first identifies the elements of the asserted claim based on statute or case
11 law. *Id.* at 1949. The Ninth Circuit follows the methodological approach set forth
12 in *Iqbal* for the assessment of a plaintiff's complaint:

13 “[A] court considering a motion to dismiss can choose to begin by
14 identifying pleadings that, because they are no more than conclusions, are
15 not entitled to the assumption of truth. While legal conclusions can provide
16 the framework of a complaint, they must be supported by factual allegations.
When there are well-pleaded factual allegations, a court should assume their
veracity and then determine whether they plausibly give rise to an
entitlement to relief.”

17 *Moss v. U.S. Secret Service*, 572 F.3d 962, 970 (9th Cir. 2009) (*quoting Iqbal*, 129
18 S.Ct. at 1950).¹

19 ¹ Rule 12(f) of the Federal Rules of Civil Procedure allows the court to strike from
20 “any pleading any insufficient defense or any redundant, immaterial, impertinent,

1 The Ninth Circuit has repeatedly held that “a district court should grant
2 leave to amend even if no request to amend the pleading was made, unless it
3 determines that the pleading could not possibly be cured by the allegation of other
4 facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). The standard for
5 granting leave to amend is generous. The court considers five factors in assessing
6 the propriety of leave to amend—bad faith, undue delay, prejudice to the opposing
7 party, futility of amendment, and whether the plaintiff has previously amended the
8 complaint. *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir.
9 2011).

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or scandalous matter.” The purpose of a Rule 12(f) motion is to avoid the costs that
16 arise from litigating spurious issues by dispensing with those issues prior to trial.
17 *Sidney–Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Immaterial
18 matter is defined as matter that “has no essential or important relationship to the
19 claim for relief or the defenses being pleaded.”
20

1 **1. Wrongful Discharge in Violation of Public Policy.**

2 To state a claim for wrongful termination in violation of public policy, a
3 plaintiff must satisfy a four factor test. The plaintiff must show:

4 (1) the existence of a clear public policy (the clarity element);

5 (2) that discouraging the conduct in which he or she engaged would
6 jeopardize the public policy (the jeopardy element);

7 (3) that the public-policy-linked conduct caused the dismissal (the causation
8 element); and

9 (4) that the defendant has not offered an overriding justification for the
10 dismissal (the absence of justification element).

11 *Cudney v. ALSCO, Inc.*, 172 Wash.2d 524, 529, 259 P.3d 244 (2011)(italics and
12 brackets omitted). These elements are conjunctive, meaning that all four elements
13 must be proved. *Id.* This public-policy based wrongful-termination claim is a
14 narrow exception to Washington's general rule of employment at will. *Thompson v.*
15 *St. Regis Paper Co.*, 102 Wash.2d 219, 232, 685 P.2d 1081 (1984). The plaintiff
16 “must plead and prove that a stated public policy, either legislatively or judicially
17 recognized, may have been contravened.” *Thompson*, 102 Wash.2d 219 at 232–33,
18 685 P.2d 1081, 1089. Washington courts have generally recognized the public
19 policy exception when an employer terminates an employee as a result of his or her
20 (1) refusal to commit an illegal act, (2) performance of a public duty or obligation,

1 (3) exercise of a legal right or privilege, or (4) in retaliation for reporting employer
2 misconduct. *Danny v. Laidlaw Transit Services, Inc.*, 165 Wash.2d 200, 208, 193
3 P.3d 128, 132 (2008).

4 Plaintiff's wrongful discharge allegations are contained in paragraphs 187
5 through 193 of her first Amended Complaint (ECF No. 5). Plaintiff only identifies
6 Washington's Law Against Discrimination, RCW 49.60.180 (WLAD) and
7 Washington's Law Against Retaliatory Discharge, RCW 51.48.025 (WLARD), as
8 the public policies being violated. Plaintiff's reasoning is circular. These two
9 statutes provide for a cause of action themselves. They do not support a third
10 cause of action for wrongful discharge as there is no additional "jeopardy" not
11 already protected by the statutes themselves. Plaintiff has not shown that WLAD
12 and WLARD are "inadequate to protect public policy." *See Cudney v. ALSCO,*
13 *Inc.*, 172 Wash.2d at 530-31, 259 P.3d at 247.

14 The Court finds this cause of action insufficient. Plaintiff has already
15 amended her complaint once and the Court finds that further amendment as to this
16 cause of action would be futile.

17 **2. Failure to Accommodate.**

18 Under RCW 49.60.180, a disabled employee has a cause of action for at
19 least two different types of discrimination. The employee may allege failure to
20 accommodate where the employer failed to take steps "reasonably necessary to

1 accommodate the employee's condition.” *Jane Doe v. Boeing Co.*, 121 Wash.2d 8,
2 17, 846 P.2d 531 (1993). The employee also may file a disparate treatment claim
3 if the employer discriminated against the employee because of the employee's
4 condition. *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 145, 94 P.3d 930, 934
5 (2004). The Washington Supreme Court has laid out four elements that an
6 employee must show to prove discrimination based on lack of accommodation:

- 7 (1) the employee had a sensory, mental, or physical abnormality that
8 substantially limited his or her ability to perform the job; (2) the
9 employee was qualified to perform the essential functions of the job in
10 question; (3) the employee gave the employer notice of the abnormality
and its accompanying substantial limitations; and (4) upon notice, the
employer failed to affirmatively adopt measures that were available to
the employer and medically necessary to accommodate the abnormality.

11 *Riehl v. Foodmaker, Inc., supra.*

12 Plaintiff’s failure to accommodate allegations are contained in paragraphs
13 202 through 206 of her First Amended Complaint. Plaintiff’s allegations are the
14 type of wholly inadequate statements condemned in *Twombly* and *Iqbal*. Plaintiff
15 responded that she provided a list of facts supporting this claim (incorporating the
16 prior 202 paragraphs of the Complaint by reference), specifically she points to the
17 First Amended Complaint paragraphs 35, 36, 38, 39, 42 and 184 et seq. Other than
18 conclusory statements, however, none of the four elements of this cause of action
19 have been properly pleaded with short, plain statements of fact. For instance,
20 paragraph 42 alleges, “In May 2010, when Ms. Armijo returned to work, she

1 requested her supervisor Stacie George for a reasonable accommodation. Stacie
2 George denied such a request.” That is less than informative and does not meet the
3 elements of a properly pleaded cause of action.

4 The Court finds this cause of action insufficient. Plaintiff has already
5 amended her complaint once and the Court finds that further amendment as to this
6 cause of action would be futile. This is especially true in this case since the
7 underlying WLAD and ADA claims remain pending, each with an allegation of
8 failure to accommodate, as well. *See* First Amended Complaint, ¶ 184.

9 **3. Intentional Infliction of Emotional Distress (Tort of Outrage).**

10 The basic elements of the tort of outrage are: “(1) extreme and outrageous
11 conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual
12 result to the plaintiff of severe emotional distress.” *Rice v. Janovich*, 109 Wash.2d
13 48, 61, 742 P.2d 1230 (1987); Restatement (Second) of Torts § 46 (1965). The
14 conduct in question must be “so outrageous in character, and so extreme in degree,
15 as to go beyond all possible bounds of decency, and to be regarded as atrocious,
16 and utterly intolerable in a civilized community.” *Dicomes v. State*, 113 Wash.2d
17 612, 630-631, 782 P.2d 1002, 1012 - 1013 (1989)(citing *Grimsby v. Samson*, 85
18 Wash.2d 52, 59, 530 P.2d 291 (1975)). The question of whether certain conduct is
19 sufficiently outrageous is ordinarily for the jury, but it is initially for the court to
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1 determine if reasonable minds could differ on whether the conduct was sufficiently
2 extreme to result in liability. *Id.*

3 In this case, Ms. Armijo alleges a tort of outrage from paragraph 216 to 226
4 of her First Amended Complaint. Ms. Armijo specifies two actions to support her
5 claim; first, her discharge from employment with discriminatory or retaliatory
6 motive, and second, leaving her diary writings open on top of her personal
7 belongings when they were returned to her. ¶ 218 and ¶ 220.

8 The Washington Supreme Court's decision in *Dicomes* is highly informative
9 to this case. In *Dicomes*, the Plaintiff argued that her discharge constituted
10 outrageous conduct because it allegedly showed her to be an incompetent and
11 disloyal employee. She argued that the management study was "an intentionally
12 prepared false report created for the sole purpose of embarrassing, humiliating and
13 then terminating Ms. Dicomes . . ." She asserted that if this allegation was true, it
14 would constitute outrageous conduct. The Supreme Court disagreed:

15 First, even if the purpose of the study was to fire plaintiff, the fact of the
16 discharge itself is not sufficient to support a claim of outrage. *Evrard v.*
Jacobson, 117 Wis.2d 69, 342 N.W.2d 788 (Ct.App.1983).

* * *

17 Second, mere insults and indignities, such as causing embarrassment or
18 humiliation, will not support imposition of liability on a claim of outrage.
Restatement (Second) of Torts § 46, comment d (1965); *Grimsby*, 85
19 Wash.2d at 59, 530 P.2d 291.

20 *Dicomes v. State*, 113 Wash.2d at 631, 782 P.2d at 1013.

1 Thus, under the high bar set by the Washington Supreme Court, Plaintiff has
2 not made sufficient allegations supporting a tort of outrage for her termination. If
3 falsifying evidence to support a termination is not enough in *Dicomes*, then
4 termination with a discriminatory or retaliatory motive cannot be enough to
5 support this tort. Assuming Plaintiff's allegations are true concerning the manner
6 in which her diary writings were delivered, she has not shown that to be atrocious
7 conduct. The return of personal property stored on an employer's premises
8 certainly could cause embarrassment and humiliation, but the fact remains that
9 someone had to collect Plaintiff's property, identify it as belonging to her not the
10 employer and return it. Assuming all Plaintiff's factual allegations as true, the
11 Court cannot find that the facts support a tort of outrage for conduct "utterly
12 intolerable in a civilized community."

13 The Court finds this cause of action insufficient. Plaintiff has already
14 amended her complaint once and the Court finds that further amendment as to this
15 cause of action would be futile.

16 **4. Negligent Infliction of Emotional Distress.**

17 In *Hunsley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096 (1976), the
18 Washington Supreme Court first applied the requirement of objective
19 symptomatology to the tort of negligent infliction of emotional distress. This was
20 a year after the Washington Supreme Court first recognized the corollary

1 intentional tort of outrage in *Grimsby v. Samson*, 85 Wash.2d 52, 530 P.2d 291
2 (1975). The question posed in *Hunsley* was whether a plaintiff who suffered
3 emotional distress when a negligently driven car crashed into her house could
4 collect for negligent infliction of emotional distress when she suffered no physical
5 impact and stood outside the zone of immediate danger. *See Hunsley*, 87 Wash.2d
6 at 425, 553 P.2d 1096. *Hunsley* held that the plaintiff could recover if she proved
7 negligence, i.e., duty, breach, proximate cause, and damage, and proved the
8 additional requirement of objective symptomatology. *See Kloepfel v. Bokor*, 149
9 Wash.2d 192, 199, 66 P.3d 630, 634 (2003). In *Kloepfel*, the Supreme Court
10 compared the two causes of action as follows:

11 The distinction in treatment between negligence and intentional torts is
12 related to the difference in fault.

* * *

13 Washington is no exception to this rule. In *Smith v. Rodene*, 69 Wash.2d
14 482, 418 P.2d 741, 423 P.2d 934 (1966), this court stated:

14 “We think that a fair summary of the holdings in such cases is as
15 follows: (1) Where plaintiff suffers mental or emotional distress
16 which is caused by some negligent act of the defendant, there is no
17 right of action, even although the mental condition in turn causes
18 some physical injury; unless the act causing the mental fright or
19 emotional distress also threatens an immediate physical invasion of
20 plaintiff's personal security, that is, threatens immediate bodily harm.
(2) But where mental suffering or emotional distress is caused by a
wilful act, recovery is permitted.”

Kloepfel v. Bokor, 149 Wash.2d at 200, 66 P.3d at 634 - 635.

1 In the employment context, the Washington Supreme Court has likewise
2 been instructive:

3 As Division Three of the Court of Appeals observed in *Bishop v. State*, 77
4 Wash.App. 228, 233 n. 5, 889 P.2d 959 (1995), “Since *Hunsley*, courts have
5 recognized the limitations of direct actions for negligent infliction of
6 emotional distress.” (citing *Calhoun v. Liberty N.W. Ins. Corp.*, 789 F.Supp.
7 1540, 1548 (W.D.Wash. 1992) (routine discharge for poor work
8 performance does not give rise to cause of action for negligent infliction of
9 emotional distress); *Lords [v. N. Auto. Corp.]*, 75 Wash.App. [589,] at 595,
10 881 P.2d 256 [(1994)] (absent “a clear mandate of public policy,” an
11 employee has no cause of action against employer for negligent infliction of
12 emotional distress when employment at will is terminated)). We believe
13 *Bishop* correctly articulates the law in this state: “[A]bsent a statutory or
14 public policy mandate, employers do not owe employees a duty to use
15 reasonable care to avoid the inadvertent infliction of emotional distress when
16 responding to workplace disputes.” *Bishop*, 77 Wash.App. at 234–35, 889
17 P.2d 959. See also *Johnson v. Dep’t of Soc. & Health Servs.*, 80 Wash.App.
18 212, 907 P.2d 1223 (1996) (holding employers have no duty to avoid
19 infliction of emotional distress on employees when responding to
20 employment disputes).

Snyder v. Medical Service Corp. of Eastern Washington, 145 Wash.2d 233, 243-
244, 35 P.3d 1158, 1164 (2001).

15 In this case, Ms. Armijo alleges negligent infliction of emotional distress
16 from paragraph 211 to 215 of her First Amended Complaint. Ms. Armijo specifies
17 two actions to support her claim; first, the tardy return of her wide open diary
18 writings, and second, the false accusation that she improperly accessed personal
19 family records. ¶ 213 and ¶ 214. Neither allegation involves an immediate
20 physical invasion of plaintiff’s personal security and both arise out of the
employment and termination process which do not support a cause of action.

1 The Court finds this cause of action insufficient. Plaintiff has already
2 amended her complaint once and the Court finds that further amendment as to this
3 cause of action would be futile.

4 **5. Negligent Hiring, Training, Managing, and Supervision, and**
5 **6. Negligent Retention.**

6 In Washington, a cause of action for negligent supervision requires a
7 plaintiff to show that an employee acted outside the scope of his or her
8 employment. *Niece v. Elmview Group Home*, 131 Wash.2d 39, 48, 929 P.2d 420
9 (1997) (“Even where an employee is acting outside the scope of employment, the
10 relationship between employer and employee gives rise to a limited duty, owed by
11 an employer to foreseeable victims, to prevent the tasks, premises, or
12 instrumentalities entrusted to an employee from endangering others. This duty
13 gives rise to causes of action for negligent hiring, retention, and supervision.”);
14 *Rodriguez v. Perez*, 99 Wash.App. 439, 451, 994 P.2d 874 (2000) (“If an employee
15 conducts negligent acts outside the scope of employment, the employer may be
16 liable for negligent supervision.”); *Gilliam v. Dep’t of Soc. & Health Servs.*, 89
17 Wash.App. 569, 584–585, 950 P.2d 20 (1998) (“When an employee causes injury
18 by acts beyond the scope of employment, an employer may be liable for
19 negligently supervising the employee.”); *Briggs v. Nova Servs.*, 135 Wash.App.
20 955, 966–67, 147 P.3d 616 (2006), *aff’d*, 166 Wash.2d 794, 213 P.3d 910 (2009)
 (“A negligent supervision claim requires showing: (1) an employee acted outside

1 the scope of his or her employment; (2) the employee presented a risk of harm to
2 other employees; (3) the employer knew, or should have known in the exercise of
3 reasonable care, that the employee posed a risk to others; and (4) that the
4 employer's failure to supervise was the proximate cause of injuries to other
5 employees.”).

6 In this case, Ms. Armijo alleges negligent hiring, training, managing and
7 supervision in paragraphs 227 to 232 of her First Amended Complaint. Ms.
8 Armijo specifies the tortious conduct as including defendant’s employees’
9 reputation for “engaging in age and disability discrimination and other unlawful
10 conduct.” ECF No. 5, ¶ 229. Additionally, Ms. Armijo alleges negligent retention
11 from paragraphs 233 to 238. Ms. Armijo specifies the tortious conduct as “failing
12 to provide plaintiff with a safe working environment,” ¶ 235, and “Stacie George’s
13 inappropriate conduct, and that she and possibly other employees were unfit for
14 their positions,” ¶ 236.

15 Plaintiff’s Complaint is insufficient for two insurmountable reasons. First,
16 there are no allegations that the employees’ tortious conduct was performed
17 “outside the scope of employment.” Second, Plaintiff concedes that she has no
18 facts to support her allegations, but “intends to discover the employer’s prior
19 knowledge.” ECF No. 14 at 16. She speculates to a possibility that employees
20 possessed traits for unlawful discrimination and expresses her stated “intention to

1 discover this possible fact.” ECF No. 14 at 17. These are not facts, let alone
2 conclusions; they are pure speculation. Even if they were pleaded as conclusions,
3 conclusions do “not unlock the doors of discovery.” *Ashcroft v. Iqbal*, 556 U.S.
4 662, ---, 129 S.Ct. 1937, 1950 (2009).

5 The Court finds these causes of action insufficient. Plaintiff has already
6 amended her complaint once and the Court finds that further amendment as to
7 these causes of action would be futile.

8 **7. Defamation, Libel and Slander.**

9 The elements a plaintiff must establish in a defamation case are falsity, an
10 unprivileged communication, fault, and damages. *Mohr v. Grant*, 153 Wash.2d
11 812, 822, 108 P.3d 768, 773 (2005). Publication of a defamatory statement to
12 someone other than the person defamed is essential to liability. *Doe v. Gonzaga*
13 *Univ.*, 143 Wn.2d 687, 701, 24 P.3d 390 (2001), *rev'd on other grounds*, 536 U.S.
14 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). Washington courts have held that
15 intracorporate communications are not “published” for defamation purposes
16 because the corporation is essentially communicating with itself. *See Gonzaga*,
17 143 Wn.2d at 701. Intracorporate communications are not, however, absolutely
18 privileged; the privilege may be lost if the employee publishes a defamatory
19 statement to a co-employee not in the ordinary course of his or her work or if the
20 employee made the statement with actual malice. *Gonzaga*, 143 Wn.2d at 702-03.

1 “Actual malice exists when a statement is made ‘with knowledge of its falsity or
2 with reckless disregard of its truth or falsity.’” *Gonzaga*, 143 Wn.2d at 703.

3 In this case, Ms. Armijo alleges defamation, libel and slander in paragraphs
4 239 to 257 of her First Amended Complaint. Ms. Armijo alleges, inter alia, that
5 defendants “ma[de] false statements about the reasons for the termination,” ¶ 241,
6 “falsely accused plaintiff of lying and falsifying documents,” ¶ 242, “[d]efendant
7 published to third persons, both orally and in writing, statements it portrayed to be
8 factual that plaintiff accessed personal records,” ¶ 245, “[s]aid published
9 statements by defendant were untrue,” ¶ 246, “defendants’ accusation was
10 communicated by defendants to other management and/or employees . . . and to
11 third parties,” ¶ 251, resulting in damages.

12 Based on *Gonzaga*, the allegations contained in paragraph 242 cannot stand.
13 Accusations communicated to the Plaintiff, even if false, do not constitute an
14 actionable publication. Plaintiff’s allegation that defendants communicated the
15 “accusation” to other management and/or employees implicates the unpublished or
16 privileged corporate communication exception to publication. Two exceptions
17 exist however, if the communication was not in the ordinary course or was made
18 with actual malice. Here, Plaintiff has pleaded actual malice and Fed. R. Civ. P.,
19 Rule 9(b) allows malice to be alleged generally. What is missing from Plaintiff’s
20 First Amended Complaint is any specificity concerning the unprivileged

1 communication, whether it was oral or in writing, the specific words
2 communicated, who communicated the information to whom, and under what
3 circumstances. Also, Rule 9(f) considers time and place to be material when
4 testing the sufficiency of a pleading.

5 The Court finds these causes of action insufficient, but that another
6 amendment might not be futile to stating a cause of action. Accordingly, the Court
7 will allow **14 days** from the entry of this order to file an amendment to the
8 complaint as to this cause of action correcting these deficiencies.

9 **8. Invasion of Privacy.**

10 The protectable interest in privacy is generally held to involve four distinct
11 types of invasion: intrusion, disclosure, false light and appropriation. An action
12 based on invasion of privacy is separate and distinct from a defamation action.
13 *Eastwood v. Cascade Broadcasting Co.*, 106 Wash.2d 466, 469, 722 P.2d 1295,
14 1296 (1986). A false light claim arises when someone publicizes a matter that
15 places another in a false light if (a) the false light would be highly offensive to a
16 reasonable person and (b) the actor knew of or recklessly disregarded the falsity of
17 the publication and the false light in which the other would be placed. *Id.* at 470-
18 71. The theoretical difference between the two torts is that a defamation action is
19 primarily concerned with compensating the injured party for damage to reputation,
20 while an invasion of privacy action is primarily concerned with compensating for

1 injured feelings or mental suffering. The two torts overlap, however, when the
2 statement complained of is both false and defamatory. In such a case the plaintiff
3 can proceed upon either theory, or both, although he can have but one recovery for
4 a single instance of publicity. *Id.* at 471.

5 Ms. Armijo's false light claim is contained in paragraphs 258 to 273 of her
6 First Amended Complaint. The Court finds that this cause of action suffers all the
7 same insufficiencies as the defamation cause of action and more. What is missing
8 from Plaintiff's First Amended Complaint is any specificity concerning the
9 publication of false information, whether it was oral or in writing, the specific
10 words communicated, who communicated the information to whom, under what
11 circumstances, when and where.

12 Ms. Armijo's First Amended Complaint alleges that private information in
13 her diary was disseminated, ¶ 265, which, "whether true or untrue" was highly
14 offensive, ¶ 266. However, Plaintiff now acknowledges the three elements of false
15 light invasion of privacy includes the element that the publication be false. ECF
16 No. 14 at 18. Accordingly, even if the contents of the diary were disseminated,
17 Plaintiff has not properly pleaded a false light claim. Additionally, Plaintiff alleges
18 the search for her private property, ¶ 269, supports her false light claim. False light
19 invasion of privacy concerns publications, not searches. Neither paragraphs 265,
20 266, nor 269 supports a false light claim.

1 The Court finds the false light invasion of privacy cause of action
2 insufficient, but that another amendment might not be futile to stating a cause of
3 action. Accordingly, the Court will allow **14 days** from the entry of this order to
4 file an amendment to the complaint as to this cause of action correcting these
5 deficiencies.

6 **9. Failure to Pay Overtime.**

7 Plaintiff's overtime claim is set forth in paragraphs 274 to 279 of her First
8 Amended Complaint. She cites, inter alia, RCW 49.52.070, which provides:

9 Any employer and any officer, vice principal or agent of any employer who
10 shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be
11 liable in a civil action by the aggrieved employee or his or her assignee to
12 judgment for twice the amount of the wages unlawfully rebated or withheld
13 by way of exemplary damages, together with costs of suit and a reasonable
14 sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this
15 section shall not be available to any employee who has knowingly submitted
16 to such violations.

17 RCW 49.52.070. The Washington Supreme Court expressed the strong legislative
18 intent to assure payment to employees of wages they have earned:

19 [T]he fundamental purpose of the legislation, as expressed in both the title
20 and body of the act, is to protect the wages of an employee against any
diminution or deduction therefrom by rebating, underpayment, or false
showing of overpayment of any part of such wages. The act is thus primarily
a protective measure, rather than a strictly corrupt practices statute. In other
words, the aim or purpose of the act is to see that the employee shall realize
the full amount of the wages which by statute, ordinance, or contract he is
entitled to receive from his employer, and which the employer is obligated to
pay, and, further, to see that the employee is not deprived of such right, nor

1 the employer permitted to evade his obligation, by a withholding of a part of
2 the wages . . .

3 The statute must be liberally construed to advance the Legislature's intent to
4 protect employee wages and assure payment.

5 *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 159, 961 P.2d 371, 375 (1998)
6 (*citing State v. Carter*, 18 Wash.2d 590, 621, 140 P.2d 298, 142 P.2d 403 (1943)).

7 Plaintiff's First Amended Complaint neglects to allege any quantification of
8 the hours involved nor does it make any allegation of the specific days she was
9 denied overtime. Time is material when testing the sufficiency of the pleadings.
10 Fed. R. Civ. P. 9(f).

11 The Court finds the failure to pay overtime cause of action insufficient, but
12 that another amendment might not be futile to stating a cause of action.
13 Accordingly, the Court will allow **14 days** from the entry of this order to file an
14 amendment to the complaint as to this cause of action correcting both these
15 deficiencies.

16 **10. Breach of Contract.**

17 Plaintiff's breach of contract claim is alleged in paragraphs 280 to 284 of the
18 First Amended Complaint. Simply put, Plaintiff contends the conduct outlined in
19 the complaint and more specifically, her termination "breached the firm's (sic)
20 posted nondiscrimination policy." ¶ 282. She surmises, "[t]hus, defendant has
breached a contract implied in fact." ¶ 283.

1 Under Washington law, employment is generally terminable at will.
2 *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 209, 685 P.2d 1081 (1984). In
3 *Thompson*, the Washington Supreme Court recognized a cause of action for breach
4 of promise of specific treatment in specific situations:

5 [I]f an employer, for whatever reason, creates an atmosphere of job security
6 and fair treatment with promises of specific treatment in specific situations
7 and an employee is induced thereby to remain on the job and not actively
seek other employment, those promises are enforceable components of the
employment relationship.

8 *Thompson*, 102 Wash.2d at 230, 685 P.2d 1081. The employee must prove these
9 elements of the cause of action: (1) that a statement (or statements) in an employee
10 manual or handbook or similar document amounts to a promise of specific
11 treatment in specific situations, (2) that the employee justifiably relied on the
12 promise, and (3) that the promise was breached. *Korslund v. DynCorp Tri-Cities*
13 *Services, Inc.*, 156 Wash.2d 168, 184-185, 125 P.3d 119, 128 (2005). The
14 *Thompson* specific treatment claim is not an implied or express contract claim, but
15 is independent of a contractual analysis and instead rests on a justifiable reliance
16 theory. *Id.* at 185.

17 In this case, Plaintiff's cause of action relies solely on a theory of implied
18 contract. ECF No. 14 at 19. Necessarily, Plaintiff is claiming that her at-will
19 employment has been modified by a contract. A contract exists where there is an
20 offer, acceptance, and consideration. *Swanson v. Liquid Air Corp.*, 118 Wash.2d

1 512, 523, 826 P.2d 664, 670 (1992). Oral assurances of continued employment
2 and an employee's foregoing of other employment opportunities do not create an
3 implied employment contract. *Lawson v. Boeing Co.*, 58 Wash.App. 261, 265, 792
4 P.2d 545, 548 (1990). Plaintiff cites *Rowe v. Vaagen Bros. Lumber, Inc.*, 100
5 Wash.App. 268, 996 P.2d 1103 (2000), in support of her implied contract cause of
6 action. *Rowe* discusses two critical aspects of an implied contract, the terms of the
7 contract and the consideration:

8 But employment will be terminable only for just cause if promises in an
employee handbook create an actual or implied contract.

9 A true contract is created if, in exchange for the handbook promises, the
worker provides consideration in addition to required services.

10 *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wash.App. 268, 274-275, 996 P.2d 1103,
11 1108 (2000) (citations omitted). *Rowe* further explains:

12 An implied contract exists if the employee acts in justifiable reliance on
13 handbook promises. But general statements in a handbook do not create an
implied contract. To determine whether an implied contract was created, we
14 look at the alleged understanding, the intent of the parties, business custom
and usage, the nature of the employment, the situation of the parties, and the
15 circumstances of the case.

16 *Rowe*, 100 Wash.App. at 275, 996 P.2d at 1108 (citations omitted).

17 Plaintiff's First Amended Complaint does not specify the offer, (the terms of
18 the offer), the acceptance (the terms accepted) or the consideration of an implied
19 contract. The Court finds this cause of action insufficient. It is not certain that an
20 amendment would be futile. Accordingly, the Court will allow **14 days** from the

1 entry of this order to file an amendment to the complaint as to this cause of action
2 correcting all these deficiencies.

3 **SERVICE OF PROCESS**

4 The Court's file shows that HOSPITAL MANAGEMENT SERVICES OF
5 FLORIDA, INC., a Washington Corporation, doing business as Toppenish
6 Community Hospital appears to have been served November 22, 2011, and
7 HEALTH MANAGEMENT ASSOCIATES, INC., a Florida Corporation, appears
8 to have been served November 30, 2011. *See* ECF No. 3. Accordingly, neither of
9 these two defendants will be dismissed. The remaining named defendants have not
10 been served and each will be dismissed.

11 **ACCORDINGLY, IT IS HEREBY ORDERED:**

12 1. The following defendants have not been served and each are hereby

13 **DISMISSED:**

14 TIMOTHY R. PARRY, an individual person, and her (sic) marital community
15 with JANE DOE PARRY; MONTE BOSTWICK, an individual person and her
16 (sic) marital community with JANE DOE BOSTWICK; VICKI SWANK, an
17 individual person and her marital community with JOHN DOE SWANK;
18 RANDY A. JONES, and individual person, and her (sic) marital community
19 with JANE DOE JONES; YAKIMA HMA PHYSICIAN MANAGEMENT
20 CORP., a Washington Corporation, doing business as Toppenish Community

1 Hospital, and doing business as Yakima Regional Management Center and
2 Cardiology, and doing business as Health Management Associates, Inc.;
3 TIMOTHY R. PARRY, an individual person and her (sic) marital community
4 with JANE DOE PARRY; RANDALL MOGLIA, and individual person and
5 her (sic) marital community with JANE DOE MOGLIA; GARY S. BRYANT,
6 and individual and her (sic) marital community with JANE DOE BRYANT;
7 JAMES A. BARBER, and individual person and her (sic) marital community
8 with JANE DOE BARBER; KATHLEEN K. HOLLOWAY, and individual
9 person and her marital community with JOHN DOE HOLLOWAY; JOHN R.
10 FINNEGAN, and individual person and her (sic) marital community with JANE
11 DOE FINNEGAN; HOSPITAL MANAGEMENT ASSOCIATES, INC., A
12 Washington Corporation, doing business as Health Management Associates Inc;
13 John Does 1-50, Defendants.

14 2. The District Court Executive is directed to dismiss these Defendants and
15 change the caption of the case accordingly.

16 3. Defendant's Motion to Dismiss (ECF No. 7) is **GRANTED** in part and
17 **DENIED** in part. The following causes of action are dismissed with prejudice:

- 18 1. wrongful discharge in violation of public policy;
- 19 2. failure to accommodate;
- 20 3. intentional infliction of emotional distress (outrage);

4. negligent infliction of emotional distress;
5. negligent hiring, training, managing and supervision; and
6. negligent retention.

4. Plaintiff's Motion for Leave to Amend (ECF No. 16) is **GRANTED** in part and **DENIED** in part. The following causes of action are dismissed with leave to amend:

7. defamation, libel and slander;
8. invasion of privacy by false light;
9. failure to pay overtime; and
10. breach of contract.

If Plaintiff chooses to amend her complaint as to these four causes of action, she shall do so within **14 days** of the entry of this order by way of short, plain statements in a pleading entitled "Supplement to the First Amended Complaint." See Rule 15(d). This supplement, if filed, will take the place of those now excised portions of the First Amended Complaint.

The District Court Executive is hereby directed to enter this Order and furnish copies to counsel.

DATED this 11th day of April, 2012.

s/ Thomas O. Rice

THOMAS O. RICE
United States District Judge